nificance of the balancing test as a rule of judicial self-restraint.

"The demands of free speech in a democratic society . . . are better served by a candid and informed weighing of the competing interests . . . than by announcing dogmas . . . .

"But how are competing interests to be assessed? [Who] is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies . . . .

"Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress . . . .

"It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours . . . . Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech . . . .

"Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? . . .

"It is as absurd to be confident that we can measure the present clash of forces and their outcome as to ask us to read history still enveloped in the clouds of controversy" (see also: Shapiro, op. cit., pp. 543–546).

(i) *Loyalty tests and oaths:* At odds with the last two cited holdings is *United States* v. *Brown*, 381 U.S. 437, 465, 471, 472 (1965) wherein the Court, by a bare 5 to 4 majority, cast aside both the rule of presumptive validity and the balancing test and held unconstitutional as a bill of attainder § 504 of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504) which made it a crime for one who belongs to the Communist Party or who has been a member thereof during the preceding five years wilfully to continue to serve or remain a member of the executive board of a labor organization. To underscore the extent to which this holding represents a departure from the standards of judicial restraint observed in the two preceding rulings, reference is made to the following excerpts from the opinion of the four dissenting Justices (White, Clark, Harlan, and Stewart).

"[In the Douds case] the Court accepted congressional findings about the Communist Party and about the propensity of Party members 'to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government'. Moreover, Congress was permitted to infer from a person's political affiliations and beliefs' that such persons would be likely to instigate political strikes. Like § 504, the statute . . . under consideration . . . [in the Douds case] . . . did not cover all persons who might be likely to call political strikes. Nevertheless, legislative findings that *some* Communists would engage in illegal activities were sufficient to sustain the exercise of legislative power. The Bill of Attainder Clause [is now construed to forbid] . . . Congress to do precisely what was validated in Douds.

"[Moreover], if the disqualification of Party members in the Subversive Activities Control Act [*Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961)] is not a bill of attainder neither is § 504 . . . Congress . . . provided in . . . the Subversive Activities Control Act for an adjudication about Communist-action organizations, the nature of the Party has now been adjucated and an adequate probability about the future conduct of its members established to justify the disqualification which Congress has imposed . . . .

"[Today the Court concludes that] § 504 . . . . [imposes] punishment on specific individuals because it has disqualified Communist Party members without providing for a judicial determination as to each member that he will call a political strike. A likelihood of doing so based on membership is not enough. By the same token, a statute disqualifying Communists (or authorizing the Executive Branch to do so) from holding sensitive positions in the Government would be automatically infirm, as would a requirement that employees of the Central Intelligence Agency or the National Security Agency disclaim membership in the Communist Party, unless in each case it is proved by evidence other than membership in the Communist Party, the nature of which has already been adjudicated, that the individual would commit acts of disloyalty or subordinate his official undertakings to the interests of the Party."

Through a similar abandonment of the balancing test and the rule of presumed validity the Court very recently has effected a comparable reversal of position with reference to the validity of state laws exacting loyalty oaths from teachers, civil servants, and other public employees. In several decisions rendered during the early 1950's, the Supreme Court sustained the right of states and their local subdivisions to bar from employment or office persons who refused to submit to a loyalty oath requiring affirmation that they knowingly were not members of, or affiliated with, any organization which advocated or preached the doctrine of forcible overthrow of government (*Garner* v. *Los Angeles Board*, 341 U.S. 716 (1951); *Gerende* v. *Election Board*, 341 U.S. 56 (1951); *Adler* v. *Board of Education*, 342 U.S. 488 (1952)). Assigned in justification of legislation imposing such loyalty oaths was the legitimacy of a state's interest in protecting its institutions, and, more particularly, its educational system, from subversion. Today, as in 1951–1952, the Court continues to acknowledge the merits of the latter objective; but in a trio of decisions recorded during the interval, 1964–1967, it appears to have done its level best to render constitutionally impracticable continued state promotion thereof by reliance upon the loyalty oath (*Baggett* v. *Bullitt*, 377 U.S. 360 (1964), *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967)).

Whereas the Court in the earlier cases had proceeded upon the premise that civil servants, including teachers "may work for the [state or a municipal subdivision thereof] . . . upon the reasonable terms laid down by the proper authorities . . . [thereof, and] . . . if they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. . . ." This assumption, the Court announced in *Keyishian* v. *Board of Regents*, op. cit., pp. 605–606, has ceased to be tenable. No longer is one warranted in concluding that a civil servant, "denied employment because of membership in . . . [an organization listed as subversive] . . . 'is not thereby denied the right of free speech and assembly' ", and suffers at the most no more than a limitation " 'on his freedom of choice between membership in the organization and employment' ", by a state or municipality. Under currently applied standards courts are not disposed to abide by the contention that "public employment which may be denied altogether may be subjected to any conditions regardless of how unreasonable" entailing an infringement of the employee's constitutional rights.

Moreover, "mere knowing membership without a specific intent to further the unlawful aims of [a subversive] . . . organization . . . [no longer] is a constitutionally adequate basis for exclusion from" public employment. In short, "mere Party membership even with knowledge of the Party's unlawful goals . . . [today] cannot suffice to justify . . . a finding of moral unfitness" meriting dismissal.

To warrant the latter proof must be amassed that the employee (1) not only is aware of the illegal goals of the group with which he has affiliated, but also (2) "shares its unlawful purposes", and (3) actively "participates in its unlawful activities". Consequently, a loyalty oath statute which permits a "presumption of disqualification arising from proof of mere membership" to be rebutted solely "by (a) denial of membership, (b) a denial that the organization advocates the overthrow of government by force, or (c) a denial that the . . . [employee] has knowledge of such advocacy" today will be viewed as constitutionally defective. To be constrasted with this approach is that of the dissenting Justices who contend that even if it be conceded that a state "may not take *criminal action* against" officers and civil servants "who become Communists knowing of the purposes of the Party . . . , it need not retain the member as an employee and is entitled to insist that its employees disclaim, under oath, knowing membership in the designated organizations and to condition future employment upon future abstention from membership". (*Elfbrandt* v. *Russell*, op. cit., pp. 23; *Keyishian* v. *Board of Regents*, op. cit., pp. 606, 607, 608; emphasis supplied).

Further indicative of the Court's reversal of its position as to the validity of loyalty oath legislation is its present disposition to impute unconstitutional vagueness to provisions therein which hitherto it had presumed would be accorded a reasonable construction by state agencies charged with their enforcement. Thus, in *Garner* v. *Los Angeles Board*, op. cit., pp. 723–724, the Court stated that "we assume that scienter is implicit in each clause of the oath . . . We take for granted that the ordinance will be so read as to avoid raising difficult constitutional problems which any other application would present". At odds with the latter presumption is the Court's construction of the following provisions of the New York law invalidated in *Keyishian* v. *Board of Regents*, op. cit., pp. 599–601. "Subdivision 1(a) of § 105 bars employment of any person who 'by word of mouth or writing wilfully and deliberately advocates, advises, or teaches the doctrine' of forcible overthrow of government. This provision is plainly susceptible of sweeping and improper application. It may well prohibit one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims. . . . And in prohibiting 'advising' the 'doctrine' of unlawful overthrow does the statute prohibit mere 'advising' of the existence of the doctrine, or advising another to support the doctrine? Since 'advocacy' of the doctrine of forcible overthrow is separately prohibited, need the person 'teaching' or 'advising' the doctrine himself 'advocate' it? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?"

To the dissenting Justices, these "strained and unbelievable suppositions . . . could hardly occur. As we said in Dennis . . . 'we are not convinced that because there may be borderline cases' the State should be prohibited the protection it seeks. . . . Where there is doubt as to one's intent or the nature of his activities we cannot assume that the administrative boards will not give him full protection. Furthermore, the courts always sit to make certain that this is done. . . . The majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation" (*Keyishian* v. *Board of Regents*, op. cit., pp. 627–628).

(ii) *Waivers of immunity; self-incrimination:* Also lending emphasis to the current propensity of the Court to exhalt the rights of the individual, with consequences adverse to community interest found to conflict therewith, are two rulings in 1967 which protect licensed practitioners and state em-